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ALEXANDER L. STEVAS,
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No. 81-2394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTINGHOUSE ELECTRIC CORPORATION,
Appellant,

-against-

JAMES H. TULLY, JR., *et al.*,
AS THE TAX COMMISSION OF THE STATE OF NEW YORK,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED JUNE 30, 1982
PROBABLE JURISDICTION NOTED JANUARY 17, 1983

TABLE OF CONTENTS

	PAGE
Relevant Docket Entries in the Courts Below	1
Field Audit Report and Schedules, New York State Department of Taxation and Finance (May 1, 1976).	2
Perfected Petition of Westinghouse for Redetermination of Franchise Tax (September 20, 1977)	19
Answer of Department of Taxation and Finance (November 7, 1977)	29
Transcript of Proceedings before State Tax Commission (January 18, 1978)	31
Decision of the State Tax Commission (August 31, 1979)	41
Order of the Supreme Court, Albany County (January 25, 1980)	48
Decision of the Appellate Division, Third Department (June 18, 1981)	50
Order of the Appellate Division, Third Department (June 29, 1981)	55
Decision of the Court of Appeals, State of New York (April 1, 1982)	57
Order of the Court of Appeals (April 1, 1982)	67

RELEVANT DOCKET ENTRIES IN THE COURTS BELOW

Decision of the Tax Commission of the State of New York	August 31, 1979
Notice of Petition and Verified Petition filed by Westinghouse in Supreme Court of the State of New York, Albany County	December 21, 1979
Verified Answer and Return filed by Tax Commission	January 10, 1980
Order of Supreme Court, Albany County, transferring proceedings to Appellate Division of the Supreme Court, Third Judicial Department	January 25, 1980
Oral argument in Appellate Division	April 29, 1981
Decision of Appellate Division annulling Tax Commission determination	June 18, 1981
Order of Appellate Division	June 29, 1981
Notice of Appeal to Court of Appeals of the State of New York filed by Tax Commission	July 20, 1981
Notice of Cross-Appeal to Court of Appeals filed by Westinghouse	August 3, 1981
Oral Argument in Court of Appeals	February 9, 1982
Decision of Court of Appeals reinstating decision of Tax Commission	April 1, 1982
Order of Court of Appeals remitting case to Supreme Court, Albany County	April 1, 1982
Judgment entered in Supreme Court, Albany County	April 16, 1982
Notice of Appeal to Supreme Court of the United States filed	June 28, 1982

FIELD AUDIT REPORT - CORPORATION TAX

BUFFALO DISTRICT OFFICE

CORPORATION NAME AND ADDRESS WESTINGHOUSE ELECTRIC CORPORATION WESTINGHOUSE BUILDING, GATEWAY CENTER PITTSBURGH, PENNSYLVANIA 15222	EIN 25-0677540 FILE # 321 787.00 DATE RECEIVED 1/24/74
STATE & DATE OF INCORPORATION: PA 4/9/1872 | DATE BEGAN BUSINESS IN N.Y.: 2/26/43 | BUSINESS GROUP CODE #: 3611-3698 | TAXABLE UNDER ARTICLES: 9A	DATE ASSIGNED 7/12/74
BUSINESS ACTIVITY MFG., SALE & INSTALLATION OF ELECTRICAL & STEAM APPARATUS	DATE RETURNED MAY 7, 1976
REPRESENTATIVE'S NAME AND ADDRESS MR. RALPH J. WEILAND—TAX DEPARTMENT WESTINGHOUSE BUILDING, GATEWAY CENTER PITTSBURGH, PENNSYLVANIA 15222 TELEPHONE # 412 255-3382	TOTAL AUDIT MAN-DAYS 44½ ADDITIONAL TAX $225,406.99 INTEREST $ 42,176.40 TOTAL $267,583.39
CONSENT SIGNED? ☐ YES ☒ NO | CORP. AGREES? ☐ YES ☒ NO	REFUND REQUESTED $
FORWARDED MATERIAL RETURNED: NYS Franchise Tax Reports for CY 1968, and CY's 1961-1973 CT-8 based on CY 1967, CT-3360 reports for CY's 1968-1970 Prior field audit report covering CY's 1965-1968 License Fee Data Correspondence	AUDITED REFUND $ REDUCED REFUND $
NEW MATERIAL OBTAINED: CT-318 extending the CY 1970 to 11/15/75 CT-318 extending the CY's 1970 & 1971 to 11/15/76 Copies of taxpayer's letters dated 4/26/76 & 9/3/75	AMOUNT COLLECTED $ -0- FUTURE POSSIBLE TAX EFFECT $

SUMMARY OF YEARS AUDITED AS REPORTED:

YEAR	ENTIRE NET INCOME	BUS. ALLOC.	TAX BASIS	TAX AMOUNT
CY 1973	43,715,850	6.239516%	INC	205,848
1972	136,516,711	6.387743%	INC	749,384
1971	86,344,898	7.089093%	INC	808,413
1970	60,735,141	8.064358%	INC	139,923

SUBMITTED:

/s/ R.L. Gritzke
R. L. GRITZKE

/s/ R.H. Stein
R. H. STEIN

ANALYSIS OF AUDIT ADJUSTMENTS

ADJUSTMENT AREA	TAX EFFECT
1. FEDERAL CHANGES	$
2. INTEREST TO STOCKHOLDERS	
3. DEDUCTIONS ATTR. TO SUB. CAP./INCOME	
4. NET OPER. LOSS DEDUCT.	
5. OTHER E.N.I. ADJUSTMENTS	224,073
6. OPTIONAL DEPRECIATION	
7. BUSINESS ALLOCATION FACTORS	(808)
8. INVESTMENT INCOME, CAPITAL AND ALLOCATION	
9. SUBSIDIARY CAPITAL AND ALLOCATION	
10. TAX CREDITS CHANGES—DISC EXPORT CR.	(6,859)
11. BALANCE OF AUDIT ADJUSTMENTS	

REVIEWED

/s/ R.H. Stein
R. H. STEIN

APPROVED

Anthony J. Palmer
DISTRICT TAX SUPERVISOR

BY:
/s/ S.B. Friedson
CHIEF CORPORATION SECT.

S. B. Friedson

CENTRAL OFFICE USE

Related Cases:

AMERICAR, INC.	E.I.N. 59-1050690 FILE NO. 014 169.50
CREDIT SERVICES, INC.	E.I.N. 13-2501295 FILE NO. 071 799.75
GROUP W PRODUCTIONS (Previously returned to Albany on 10/28/75)	E.I.N. 13-1929317 FILE NO. 127 567.55
K. W. BATTERY COMPANY	E.I.N. 25-1191356 FILE NO. 159 697.10
LONGINES-WITTNAUER, INC.	E.I.N. 13-0983160 FILE NO. 182 030.00
LONGINES-WITTNAUER WATCH CO.	E.I.N. 13-0983160 FILE NO. 182 027.00
RADIO ADVERTISING REPRES. INC.	E.I.N. 13-1886810 FILE NO. 246 382.25
TELEVISION ADVERTISING REPRES. INC.	E.I.N. 13-1887580 FILE NO. 297 376.00
WESTINGHOUSE BROADCASTING CO. INC. (DEL.)	E.I.N. 13-1969056 FILE NO. 321 785.50
WESTINGHOUSE BROADCASTING CO. INC. (IND.) (Previously returned to Albany on 10/28/75)	E.I.N. 13-1805539 FILE NO. 321 788.00
WESTINGHOUSE CREDIT CORPORATION	E.I.N. 25-1007352 FILE NO. 321 786.00
WESTINGHOUSE LEASING CORPORATION	E.I.N. 25-1193025 FILE NO. 321 788.10

EXPLANATION

The files of Westinghouse Electric Corporation and other affiliated companies were forwarded to the Buffalo District Office for general verification purposes.

The examination of Westinghouse Electric Corporation covered the CY's 1970 through 1973.

FINDINGS

General

Westinghouse Electric Corporation was incorporated in Pennsylvania on April 9, 1872 and began business in New York State on February 26, 1943. This company files on a Federal Consolidated Return with numerous affiliated companies.

The taxpayer manufactures and sells thousands of highly diversified basic products, ranging from home appliances to commercial nuclear power plants and from integrated circuits to water desalting plants. Included among its products are steam and gas turbines; mechanical equipment required by power companies, railroads and industry; propulsion and electronic equipment for the Navy and Marine industry and other equipment for the aerospace industry.

Household appliances and related products are distributed by independent distributors and dealers and through two sales divisions. The other products manufactured are, in general, sold to customers through other sales organizations of the company which have main and branch offices throughout the United States, and in certain cases through independent distributors and dealers. In December of 1974, Westinghouse Electric Corporation agreed to sell its major appliance business to White Consolidated Industries.

The company maintains plants and other facilities throughout the country for the maintenance and repair of equipment and appliances of its own manufacture and some equipment manufactured by others.

All shipments of its own products originate either from its own plants or company operated warehouses. In some cases, items are manufactured or processed by independent contractors and shipped to customers from these points.

In addition, to its own research and development activities, carried on at Pittsburgh, Pennsylvania, the taxpayer operates two additional facilities for the United States Navy, identified as the Bettis installation and P.A.D.

In the case of Bettis, an atomic power research unit, the taxpayer operates a government-owned facility, with some funds advanced by the government for materials and inventory. Research is carried on by Westinghouse employees who are paid by the taxpayer, although the funds are indirectly advanced by the Federal Government. Approximately 50% of the work is let out to subcontractors.

In the case of P.A.D., a rented facility, the taxpayer acts as a procurement agent for the government in the implementation of certain Navy projects. The government is billed for certain material and wages involved and the taxpayer is subsequently reimbursed for any expenditures.

The company's general offices are located in Pittsburgh, Pennsylvania. New York plants are located at Buffalo, Bath and Klaira, with storage and repair facilities located at strategic areas of the state. The New York main sales office, located at the Pan Am Building in New York City, covers all of New York State and parts of Connecticut and New Jersey. Smaller branch offices are located throughout the state.

A prior field audit was conducted on this company by the Buffalo District Office which covered the C. Y.'s 1965 through 1968.

Federal Changes

The results of changes in Federal Taxable Income have been reported through CY 1970. Federal changes for years subsequent to 1970 have not been finalized, and it is recom-

mended that returns for these years be retained until Federal changes are reported.

This company's CT-3360's Report of Change in Taxable Income by U. S. Treasury Department, were examined and found to be in order for the CY's 1969 and 1970. These were the only two years open under the Statute of Limitations.

No adjustments are recommended in this area.

Entire Net Income

The tax base for the entire audit period was allocated net income.

Federal Taxable Income, as reported for franchise tax purposes, was verified to line 28 of the taxpayer's Federal 1120 report for all years under audit.

Federal non-taxable interest income and the taxpayer's New York State Franchise Tax deduction on its federal return were correctly added back and no interest was paid to stockholders.

The deductions claimed for interest, dividends, and capital gains from subsidiary capital, and 50% of dividends from non-subsidiary companies were found to be correct for all years under audit.

Federal depreciation on qualified property was correctly added back and the taxpayer made a proper deduction for foreign taxes on which it claimed a credit on its Federal Return. The foreign tax deduction was composed of all foreign taxes paid on royalities, interest and sales; and 50% of foreign taxes on non-subsidiary dividends.

The taxpayer has been reporting an add back for interest expense attributable to subsidiary capital on the basis of a formula prescribed in a prior field audit report. According to this formula, the taxpayer was to specifically set out increases in notes receivable from Westinghouse Credit Corporation as being related to long-term borrowings. The taxpayer's effective rate of interest on long-term borrowings for the year of the

borrowing was to be applied against this balance to arrive at interest expense attributable to subsidiary capital.

In addition to this add back shown on its CT-3, the taxpayer has been making an add back for interest expense attributable to subsidiary capital (other than Westinghouse Credit Corporation) on its Federal 1120 via a contra account to other deductions.

This add back was based on the taxpayer's investment in these subsidiaries and loans and advances to these companies.

Test computations indicated that an indirect attribution on a formula basis applying the ratio of subsidiary assets over total assets to interest expense would not yield an add back greater than that made by the taxpayer.

Consequently, it is recommended that the taxpayer's treatment of interest expense attributable to subsidiary capital be accepted.

The taxpayer's treatment of Optional Depreciation and the taxpayer's Domestic International Sales Corporation are covered in subsequent sections of this report.

Optional Depreciation

This company has been claiming optional depreciation on qualified property acquired between 1964 and 1967, which had a New York situs. The taxpayer has properly accounted for depreciation taken on these assets over the years for both Federal and State purposes.

When a disposition is made by retirement or sale, the taxpayer does not recognize a capital gain or loss for Federal purposes but instead elects to use the accounting treatment provided for in IRC Reg. 1.167 (a)7(b) for multiple asset or group accounting.

Under this method, there is a credit to assets for the full cost of the item and to accumulated depreciation for any proceeds received with corresponding debits to accumulated depreciation and cash respectively. Where there are no pro-

ceeds on disposal accumulated depreciation is debited for the full cost of the asset.

For disposals of qualified New York State property, the taxpayer credits assets and debits accumulated Federal and New York State Optional Depreciation for the full cost of the item. Any proceeds received are added directly to allocated income.

Under this method, the taxpayer will be accounting for the difference between the New York and Federal basis by future add backs of Federal depreciation to entire net income.

It should be noted that the taxpayer transferred some machinery and equipment on which it has been claiming optional depreciation from Buffalo, New York to a plant located in Virginia in CY 1972 which had a cost of $4,806,705. This was handled in the same manner as a disposal of qualified New York property. The difference between the New York and Federal basis will be accounted for as in the case of disposals by future add backs of federal depreciation to entire net income.

The taxpayer's control of qualified property and its method of accounting for federal and state depreciation and gains on qualified property were found to be acceptable. No adjustments are recommended in this area.

DISC

Westinghouse Electric Export Corporation, a wholly owned subsidiary of Westinghouse Electric Corporation, was incorporated on December 22, 1971, and filed its election to be treated as a DISC on February 21, 1972. The corporation has filed Federal 1120 DISC returns for the CY's 1972 and 1973.

This DISC's total income consisting primarily of commission income was $25,987,000 and $57,948,738 for the CY's 1972 and 1973, respectively. Westingthouse Electric Corporation has reported its deemed dividend from this DISC of $12,596,500 and $29,838,006 for the CY's 1972 and 1973, respectively, as business income on its CT-3 reports.

Westinghouse Electric Export Corporation acts as a commission agent in the export sale of electrical and steam apparatus products which are manufactured by Westinghouse Electric Corporation and several other affiliated companies. Commission income received from the sale of Westinghouse Electric Corporation's products represents over 80% of this company's income. The other 20% is from affiliates who are not New York taxpayers. This DISC has no employees of its own and it does not own any real or personal tangible property, or pay any real estate rentals.

Since Westinghouse Electric Export Corporation meets the more than 5% test, with its stockholders, it is a tax exempt DISC and Westinghouse Electric Corporation is required by law to file form CT-3C, New York State Consolidated Franchise Tax Report. Since the taxpayer has not filed a consolidated report for 1972 and 1973, we have reflected the tax on a consolidated basis for these years in Schedule "B".

The computation of additional income which consists of the DISC's total income, less the "deemed dividend" reported as business income by Westinghouse Electric Corporation, is detailed in Schedule "B". The denominator of the receipts factor has also been increased as detailed in Schedule "D", to reflect total commission income as business income of the DISC less commission received from Westinghouse Electric Corporation which would be an elimination on the consolidated report. In addition, the allowable DISC export credit has been computed in Schedule "D". Approximately 5% of the stockholders' total export shipments are made from regular places of business in New York State.

The taxpayer has been advised to file forms CT-3C, the Consolidated Franchise Tax Report, and CT-3B, the Information Report for tax exempt DISC's for subsequent tax periods.

The corporation has protested the taxation of the deferred income of the DISC which is covered under the "Taxpayer Protest" section of this report.

BUSINESS ALLOCATION

Property Factor

The taxpayer correctly reported the AFMV of real and tangible personal property owned based on an annual average of net book values.

This company properly excluded personal property rentals and included the current years amortization of leasehold improvements in its computation of the capitalized value of real estate rented for all years under audit.

No adustments are recommended.

Receipts Factor

Sales of tangible personal property were correctly reported on a destination basis for all years under audit. The taxpayer correctly included Turn Key billings (derived from nuclear power plants built for utilities) and receipts from Bettis and P.A.D. (described in the general section of this report) at net rather than gross, as recommended by the Bureau after the last field audit conducted on this company. These receipts have been decreasing and no longer have a material effect.

Rentals of property and royalties were also examined and found to be correctly allocated.

No adjustments to the receipts factor would be required for Westinghouse Electric Corporation on an individual basis, but as discussed earlier in the DISC section of this report, the denominator of the Receipts Factor is being adjusted to reflect the business receipts of the DISC as detailed in Schedule "C".

Payroll Factor

Gross payroll was correctly reflected in both the numerator and denominator of the payroll factor. The taxpayer properly excluded general executive officers, and correctly included other officers whose responsibilities and authority are limited by territory.

No adjustments are recommended in this area.

Total Capital

In no year under audit was the tax base allocated capital.

This corporation computed the AFMV of Total Capital using total assets, per its balance sheet, averaged on an annual basis plus the excess of the AFMV of subsidiary capital (Schedule "C" CT-3) over the valuation of subsidiary assets reflected in its balance sheet, less current liabilities.

Current liabilities were examined and although there is a possibility that some adjustments could be made in this area, such adjustments would not have the affect of producing a tax based on allocated capital, larger than that based on allocated income.

No adjustments are recommended in this area.

Subsidiary Capital & Allocation

The taxpayer computed the AFMV of subsidiary capital using either the individual subsidiary's total capital or equity plus loans and advances averaged on an annual basis. It should be noted that in most cases, total capital was approximately equal to equity plus loans and advances. Some negative AFMV's were used but these are minor when compared to the total. No meaningful distortion resulted from this treatment by the taxpayer and any adjustments in this area would not have a significant tax effect.

As described earlier in this report, the taxpayer accounted for the difference in basis between its balance sheet valuation of cost and that used in its computation of the AFMV of subsidiary capital.

Examination of the subsidiary allocation percentages used by the taxpayer revealed that stock allocation percentages were used in most instances. On occasion, a business allocation percentage was used instead, but over all, no significant tax effect would result from adjustments in this area.

No adjustments are recommended.

Investment Capital, Allocation and Income

The AFMV of Investment Capital was generally valued at cost, per the taxpayer's balance sheet, averaged on an annual basis. Besides investments in non-subsidiary companies, the taxpayer included obligations of the United States and its instrumentalities; New York, its political subdivisions and instrumentalities and cash.

The issuers' allocation percentages employed by the taxpayer were examined and found to be substantially correct.

The taxpayer's treatment of investment capital and its allocation to New York appears to adequately reflect an understated AFMV. No adjustments are recommended.

Investment Income, as reported, consisted of 50% of dividends from non-subsidiary companies, less the foreign taxes applicable to this dividend income, plus interest income from state and municipal obligations and non-subsidiary companies.

This company did not include gains and losses on the sale of securities held for investment in investment income during the audit period. Since these gains and losses tended to offset each other, no adjustments are recommended to investment income.

Intercompany Transactions, Arrangements & Combined Reports

The taxpayer's subsidiaries are, in general, autonomous in nature with employees of their own and independent places of business. Merchandise transactions are consummated at the equivalent of "arms length" and the taxpayer is reimbursed by its subsidiaries for services rendered in their behalf. No distortion to the New York Tax base from transactions between the parent company and other affiliated companies is evident and the financial status of each company can be independently determined.

Particular attention was given to Westinghouse Credit Corporation and Westinghouse Leasing Corporation. West-

inghouse Credit Corporation is a wholly owned subsidiary of Westinghouse Electric Corporation and is engaged in the financing of equipment and other products in the industrial, commercial and consumer fields. Approximately 98% of the financing provided is for non-Westinghouse products and this company has its own offices and employees.

Westinghouse Leasing Corporation is a wholly owned subsidiary of Westinghouse Credit Corporation. This company owns equipment and leases it to others. It receives all of its financing from Westinghouse Credit Corporation and approximately 50% of its equipment is purchased from Westinghouse Electric Corporation. This company has no employees of its own and relies upon Westinghouse Credit Corporation's employees to handle all of its business operations.

The taxpayer inquired into the possibility of placing these two New York taxpayers, Westinghouse Credit Corporation and Westinghouse Leasing Corporation, on a combined reporting basis. The taxpayer was advised that permission for a combined report would not be granted on a retroactive basis. It was noted that a combined report for these two New York taxpayers would not produce a tax greater than that already paid on an individual basis. It is doubtful that the taxpayer will request permission to include these two companies on a combined report for subsequent periods.

A combined report for Westinghouse Electric Corporation, together with these two companies, would produce a tax greater than that paid on an individual basis but the facts outlined above do not warrant this combination. Consequently, combined reports are not recommended at this time.

Investment Tax Credit

The taxpayer claimed an investment tax credit for each year under audit.

Our examination revealed that the property on which the investment tax credit was claimed is used principally in the manufacturing process, has a situs in New York State, and is otherwise qualified for this credit.

The taxpayer properly computed a recapture of excess credit taken in prior years on property that was disposed of or ceased to be in qualified use prior to the end of its useful life.

No adjustments are recommended in this area.

License Fee

The taxpayer accumulated license fee payments through 1957 totaled $28,528.43. The license fee was examined for the years under audit and no additional amount is due.

Taxpayer Protest

The Corporation has disagreed with our audit adjustment requiring it to file on a consolidated basis with its tax exempt DISC. The objection is based solely on constitutional grounds, as stated in their letter of 9/3/75 which is enclosed. The taxpayer feels our law is "unconstitutional" and has indicated a willingness to take this issue to court. A conference was held at the Buffalo District Office on 12/22/75 and all other audit issues were resolved.

RECOMMENDATION

Based on our audit findings, it is recommended that a Notice of Deficiency be issued in the amount of $267,583.39 as detailed in Schedule "A". The corporation will petition for redetermination of deficiency after formal billing.

ATTACHED SCHEDULES

A. Summary of Additional Tax Due

B. Computation of Additional Tax Due—Per Audit

C. Computation of the Business Allocation Percentage

D. Computation of the DISC Export Credit

WESTINGHOUSE ELECTRIC CORPORATION

Summary of Additional Tax Due

Schedule "A"

CY	Additional Tax Due—Per Audit (Schedule "B")	Interest to May 15, 1976		Total
1973	$151,436.76	$24,608.47	16.25%	$176,045.23
1972	73,970.23	17,567.93	23.75%	91,538.16
1971	—	—		—
1970	—	—		—
Totals	$225,406.99	$42,176.40		$267,583.39

WESTINGHOUSE ELECTRIC CORPORATION

Computation of Additional Tax Due—Per Audit

Schedule "B"

	CY 1973		CY 1972	
Entire Net Income—as reported (inclusive of adjustments for changes in Federal Taxable Income reported on CT-3360, CY 1970)		$43,715,850		$136,516,711
Total DISC Income—per Federal 1120 DISC Report	$57,948,738		$25,987,000	
Less: "Deemed Dividend" already reflected in Entire Net Income	27,838,006		12,596,500	
Adjustment to include DISC Income on a Consolidated Basis		28,110,732		13,390,500
Entire Net Income—per audit		71,826,582		149,907,211
Investment Income—as reported	396,586	396,586	579,278	579,278
Business Income—per audit		71,429,996		149,327,933
Business Allocation Percentage—per audit, from Schedule "C"		6.234494%		6.394454%
Allocated Business Income—per audit		4,453,291		9,533,773
Investment Allocation Percentage—as reported	.001373%		.000856%	
Allocated Investment Income		5		5
Total Allocated Income—per audit		4,453,304		9,533,778
N. Y. Gain or (Loss) on Qualified Property—as reported		21,602		5,555
Optional Depreciation on Qualified N. Y. Property—as reported		(156,584)		(172,733)
Taxable Net Income—per audit		4,318,322		9,366,600
Tax on Taxable Net Income @ 9% for the CYs 71-73, 7% for CY 1970	388,648.98		842,994.00	
Tax on Allocated Subsidiary Capital—as reported	28,182.00		24,584.00	
Investment Tax Credit—as reported	(53,748.00)		(41,654.00)	
DISC Export Credit—from Schedule "D"	(6,098.22)		(2,569.77)	
Tax—per audit		356,784.76		823,354.23
Tax—as reported		205,548.00		749,384.00
Additional Tax Due—per audit, to Schedule "A"		$151,436.76		$ 73,970.23

WESTINGHOUSE ELECTRIC CORPORATION

Computation of the Business Allocation Percentage

Schedule "C"

	CY 1973		CY 1972	
	New York	Everywhere	New York	Everywhere
Property Factor:				
Percentage in N. Y.—as reported	5.636229%		5.873047%	
Receipts Factor:				
Total Receipts—as reported	228,761,326	4,038,022,730	218,139,529	3,668,854,313
Adjustments to include DISC Receipts on a Consolidated basis:				
Add: Total DISC Commission Income	—	55,265,711	—	25,987,000
Deduct: DISC Commission Income received from Westinghouse Electric Corporation	—	44,497,105	—	19,888,000
Total Receipts—per audit	228,761,326	4,048,791,336	218,139,529	3,674,953,313
Percentage in N. Y.—per audit	5.650114%		5.935845%	
Payroll Factor:				
Percentage in N. Y.—as reported	7.417141%		7.344470%	
Total New York State Percentages	18.703483%		19.153362%	
Business Allocation Percentage—per audit, to Schedule "B"	6.234494%		6.384454%	

WESTINGHOUSE ELECTRIC CORPORATION

Computation of the DISC Export Credit

Schedule "D"

	CY 1973		CY 1972	
Entire Net Income of DISC	57,948,738		25,987,000	
Less: Deemed Dividend Distribution	29,838,006		12,596,500	
Attributable Base (100% owned DISC)		28,110,732		13,390,500
N.Y. Receipts (stockholder's export property receipts from DISC where shipments were made from stockholder's regular place of business in New York)	22,539,000		10,668,000	
Total Receipts (stockholder's total export property receipts from its DISC)	408,080,000		223,587,000	
Percentage of Shipments from New York		5.523182%		4.771297%
Eligible Base		1,552,607		638,901
Business Allocation Percentage, from Schedule "C"		6.234494%		6.384454%
Allocated Eligible Base		96,797		40,790
70% of Allocated Eligible Base	67,758		28,553	
Tax Rate	.09		.09	
DISC Export Credit—per audit, to Schedule "B"		609,822		256,977

T.A. 16 (1/77)

STATE OF NEW YORK

STATE TAX COMMISSION

IN THE MATTER OF THE PETITION

OF

(1) Westinghouse Electric Corporation

for (2) Redetermination of Deficiencies in the Franchise Tax on Business Corporations under Article 9-A of the Tax Law for the years 1972 and 1973

PERFECTED PETITION

IDENTIFYING NO. (3) 25-0677540
for tax administration purposes only

Petitioner Westinghouse Electric Corporation, Attn: Tax Department Telephone No. (412) 255-3800

Address (4) Westinghouse Building, Gateway Center, Pittsburgh, Pennsylvania 15222

Petitioner's representative, if any Henry W. de Koenigsberg Telephone No. (212) 422-3000

Address Cravath, Swaine & Moore, One Chase Manhattan Plaza, New York, N.Y. 10005

The petitioner hereby petitions for (5) a redetermination of deficiencies in the franchise tax on business corporations under Article 9-A of the Tax Law for pursuant to the New York State Tax Law, and in support of such petition the years 1972 and 1973 and claims a refund for taxes paid for such years alleges the following:

The petitioner received (6) notices of deficiencies

pursuant to (7) Article 9-A, Franchise Tax on Business Corporations Dated (8) 6/15/76

from (9) the corporation tax bureau

The notice provided that the tax or taxes determined were for the years or periods in the amounts of: (10)

(A) YEAR OR PERIOD	(B) TAX ARTICLE	(C) AMOUNT OF TAX DETERMINED	(A) YEAR OR PERIOD	(B) TAX ARTICLE	(C) AMOUNT OF TAX DETERMINED
1972	9-A	$ 73,970.23 plus interest			$
1973	9-A	$151,436.76 plus interest			
			TOTALS		$225,406.99 plus interest

The petitioner alleges that the (11) corporation tax bureau made the following errors: (12)

(1) The bureau calculated deficiencies of $73,970.23 for 1972 and $181,436.76 for 1973, plus interest, by erroneously including in the petitioner's entire net income certain income of Westinghouse Electric Export Corporation ("DISC").

(2) Even if the bureau is correct in increasing the petitioner's entire net income, the bureau has erred in calculating the adjustment for 1972 as follows: The DISC's taxable income for 1972 was $25,987,000, from which the bureau subtracted $12,596,500 as the deemed dividend already included in the petitioner's entire net income for 1972, to arrive at an adjustment of $13,390,500. In fact, DISC's deemed distributions included in the petitioner's entire net income for such year totalled $12,956,500. Therefore, under the bureau's theory the petitioner's entire net income should only have been increased by $13,030,500 for 1972.

(3) Even if the bureau is correct in increasing the petitioner's entire net income, the bureau has erred in calculating the credit to which the petitioner is entitled under Section 210(13)(a) of the Tax Law by limiting eligibility for such credit to income attributable to shipments from a regular place of business in New York.

(4) The petitioner further asserts that it is entitled to refunds of $167,618 for 1972 and $74,881 for 1973, representing the tax paid by the petitioner with respect to the deemed distributions by DISC for such years, plus interest.

Attached as Exhibit A is a statement setting forth the basis for the relief sought by the petitioner.

No other action has heretofore been commenced before the State Tax Commission in respect to any of the items herein before stated, nor has any relief been previously granted in respect thereto.

WHEREFORE, the petitioner prays that (13) the notices of deficiencies in the franchise tax on business corporations be cancelled for the years 1972 and 1973 and that refunds of taxes paid for such years be granted and respectfully demands that this petition be granted.

This statement is made with the knowledge that a willfully false representation is a misdemeanor punishable under section 210.45 of the Penal Law.

Sept. 20, 1977
Date

/s/ Henry W. de Koenian * *
Signature of Taxpayer or Representative*

*NOTE: If the petition is signed by any person other than the taxpayer, it must be accompanied by a duly executed power of a attorney unless either (1) a power of attorney has already been filed, or (2) the taxpayer is a minor whose return was filed by the signing the petition or is mentally or physically incapable of signing.

** A Power of Attorney authorizing the signer to represent the petitioner has already been filed.

THE PERFECTED PETITION AND 3 CONFORMED COPIES ARE REQUIRED PURSUANT TO SECTION 601.5(a) OF THE RULES

(1) Insert names of petitioner or petitioners.

(2) Insert the subject matter from the following list which is applicable to your petition:

a. For personal income tax (Article 22) or unincorporated business tax (Article 23) or both of these taxes; for the franchise tax on business corporations (Article 9-A), the tax on unrelated business income (Article 13), the gift tax (Article 26-A) the franchise tax on banking corporations (Article 32) and the franchise taxes on insurance corporations (Article 33), insert the following:

Redetermination of a Deficiency or for Refund of (specify tax or taxes involved) under Article (specify Article or Articles of the Tax Law) of the Tax Law for the Year (insert year or years involved).

b. For sales and compensating use tax (Articles 28 and 29), for the tax on transfers of stock and other corporate certificates (Article 12) for tax on gasoline and similar motor fuel (Article 12-A), for taxes on alcoholic beverages (Article 18), for tax on cigarettes (Article 20), for highway use tax (Article 21) insert the following:

Review of a Determination of Tax Due or for Refund of (specify tax or taxes) under Article (insert appropriate Article number or numbers) of the Tax Law for (insert period or periods involved)

c. For Tax on Mortgages (Article 11) insert the following:

Review of a Determination under Article 11 of the Tax Law, Tax on Mortgages, with reference to an instrument recorded (insert date instrument was recorded)

d. Where the petition involves licenses or permits under an Article of the Tax Law, insert the following:

Review of a Refusal to Issue or Denial, Revocation or Suspension of a license or permit under Article (insert appropriate Article number) of the Tax Law.

(3) Insert social security number, employer identification number or a number assigned by the Department of Taxation and Finance to the taxpayer. Do not use a file number.

(4) Insert address shown on tax return and state present address, if different.

(5) Insert matter included in caption, (2) above, specifically identifying the action e.g. refund or license renewal or redetermination of a deficiency.

(6) Insert action taken by operating bureau e.g. redetermination of deficiency, denial of refund.

(7) Insert Article & tax e.g. Article 22, Personal Income Tax.

(8) Insert date contained on notice.

(9) Insert operating bureau e.g. Income Tax Bureau.

(10) Insert in the appropriate columns the indicated information. Where the controversy involves a refund, the amount claimed should be inserted in parentheses e.g. ($375.16). Where the controversy does not involve taxes or penalties, type a brief statement of the subject across the columns for figures e.g. license as a wholesale dealer in cigarettes denied.

(11) Insert specific operating bureau.

(12) In separately numbered paragraphs, list each error of the operating bureau which the petitioner intends to prove.

Thereafter, in separately numbered paragraphs state the facts petitioner intends to prove at the hearing to establish the operating bureau's errors and to provide a basis for the relief sought by petitioner. (It is not necessary to state the evidence petitioner intends to offer in proof of the facts alleged.) Where necessary, additional pages may be added.

(13) Set forth the relief desired e.g. the notice of deficiency for personal income taxes be cancelled for tax years 1967 and 1968.

SERVICE OF THE PERFECTED PETITION AND 3 CONFORMED COPIES MUST BE MADE ON THE:

SECRETARY TO THE STATE TAX COMMISSION
P.O. BOX 5038

Exhibit A to
Westinghouse Electric Corporation
Petition for Redetermination of
Deficiencies in the New York State
Franchise Tax on Business Corporations
Under Article 9-A of the Tax Law
For the Years 1972 and 1973

(1) The petitioner, Westinghouse Electric Corporation ("Westinghouse"), a Pennsylvania corporation, owns all of the stock of Westinghouse Electric Export Corporation, a Delaware corporation ("DISC"). During 1972 and 1973, DISC qualified under Section 992(a) of the Internal Revenue Code of 1954 (the "Code") and was exempt from Federal income tax for such years under Section 991 of the Code. All of DISC's business income for 1972 and 1973 consisted of sales commissions derived from export sales of products manufactured by Westinghouse and other affiliated companies. It reported taxable income on Federal Form 1120-DISC for 1972 and 1973 in the amounts of $25,987,000 and $57,948,738, respectively.

(2) DISC did not make any *actual* distributions to Westinghouse in 1972. It *actually* distributed $10,068,500 to Westinghouse in 1973, all of which was treated as made out of previously taxed income under Section 996(a)(1) of the Code. $12,956,500 of DISC's taxable income for 1972 and $29,838,006 of its taxable income for 1973 was *deemed* distributed by DISC to Westinghouse in 1972 and 1973, respectively, under Section 995(b) of the Code and Westinghouse included these respective amounts in its Federal gross income for 1972 and 1973. Federal taxation of the remainder of DISC's taxable income for 1972 and 1973 (the "accumulated DISC income") was deferred under the DISC provisions of the Code.

(3) During 1972 and 1973, DISC did not engage in any business activities in New York, nor did it employ capital, own or lease property, or maintain an office in the State at any time during such years. DISC did not file a New York corporate

franchise tax return for either 1972 or 1973 because it was not subject to New York jurisdiction.

(4) Westinghouse filed Form CT-3 with the State of New York for 1972 and 1973 as a Pennsylvania corporation doing business in New York. Its reported entire net income for 1972 and 1973 was $136,516,711 and $43,715,850, respectively, which included the $12,956,500 and $29,838,006 deemed distributions from DISC for the respective years but did not include any portion of DISC's accumulated DISC income for such years. The deemed distributions were allocated to New York according to Westinghouse's business allocation percentages of 6.387743% for 1972 and 6.239516% for 1973, respectively, computed without regard to such deemed distributions.

(5) In separate Notices of Deficiency dated June 15, 1976, the Corporation Tax Bureau of the Department of Taxation and Finance alleged deficiencies in Westinghouse's corporate franchise tax of $73,970.23 for 1972 and $151,436.76 for 1973. The entire amount of the alleged deficiencies relates to Westinghouse's treatment of the taxable income of DISC for 1972 and 1973 on Westinghouse's own returns.

(6) Since more than 5% of DISC's gross receipts in both 1972 and 1973 consisted of sales commissions from Westinghouse, DISC would have been exempt from New York franchise tax under Section 208(9)(i)(A) of Chapter 60, Article 9-A of the New York Tax Law (the "Tax Law") even if New York had jurisdiction to subject it to tax. It is therefore alleged in the Notices of Deficiency that Westinghouse is required under Section 208(9)(i)(B) of the Tax Law to consolidate DISC's receipts, expenses, assets and liabilities with its own in computing its New York income tax liability, excluding all transactions between Westinghouse and DISC.

(7) Since Westinghouse only included the deemed distributions from DISC for 1972 and 1973, and not the DISC's accumulated DISC income for such years, in its own entire net income for 1972 and 1973, it is proposed in the Notices that

Westinghouse's entire net income for 1972 be increased by $13,390,500* from $136,516,711 to $149,907,211 and that its entire net income for 1973 be increased by $28,110,732 from $43,715,850 to $71,826,582. In addition, it is proposed in the Notices that the receipts factors used to compute Westinghouse's business allocation percentages for 1972 and 1973 be recomputed by adding DISC's commission income derived from customers other than Westinghouse for such years to the denominator of such factors, but not to the numerator, thus reducing Westinghouse's receipts factor for 1972 from 5.945712% as reported on its 1972 return, to 5.935845% and reducing its receipts factor for 1973 from 5.665182%, as reported on its 1973 return, to 5.650114%. This would reduce Westinghouse's business allocation percentage for 1972 from 6.387743% to 6.384454% and that for 1973 from 6.239516% to 6.234494%. The net effect of the two proposed adjustments for 1972 described above would be to increase Westinghouse's business income for 1972 allocable to New York from $8,683,334 to $9,533,778, an increase of $850,444, with a resulting deficiency in tax for 1972 of $76,539.96. Similarly, the net effect of the two proposed adjustments for 1973 described above would be to increase Westinghouse's business income for 1973 allocable to New York from $2,702,912 to $4,453,304, an increase of $1,750,392, with a resulting deficiency in tax for 1973 of $157,535.28.

(8) It is proposed in the Notices of Deficiency, however, that Westinghouse be allowed credits under Section 210(13)(a) of the Tax Law in the respective amounts of $2,569.77 and $6,098.22 for 1972 and 1973. Such credits were computed by first multiplying $13,390,500 and $28,110,732,

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* The auditor made an error in calculating this adjustment for 1972. The DISC's taxable income for 1972 was $25,987,000, from which the auditor subtracted $12,596,500 as the deemed dividend already included in Westinghouse's entire net income for 1972, to arrive at an adjustment of $13,390,500. In fact, DISC's deemed distributions included in Westinghouse's entire net income for such year totaled $12,956,500. Therefore, under the auditor's theory, Westinghouse's entire net income should only have been increased by $13,030,500 for 1972.

representing the DISC's accumulated DISC income for 1972 and 1973 respectively, as computed by the auditor,* by 4.771297% and 5.523182%, respectively, those being the percentages of Westinghouse's receipts from export property on which DISC earned a sales commission and which was shipped from a regular place of business of Westinghouse in New York as compared to Westinghouse's total receipts on the sale of export property for such years for which DISC received a sales commission.

(9) The respective products, $638,901 for 1972 and $1,552,607 for 1973, were then multiplied by Westinghouse's revised business allocation percentages for the respective years, with the result that of the $13,390,500 and $28,110,732 alleged to be includible in Westinghouse's entire net income for 1972 and 1973, respectively, only $40,790 and $96,797 respectively, was found to be eligible for credit under Section 210(13)(a). These amounts were then multiplied first by 70% and then by the 9% rate of tax in effect for 1972 and 1973 to arrive at credits of $2,569.77 and $6,098.22 for 1972 and 1973, respectively.

(10) It is Westinghouse's contention that the entire alleged deficiencies for 1972 and 1973 are erroneous on the ground that the proposed application of Section 208(9)(i)(B) of the Tax Law would violate the due process clauses of Article 1, Section 6 of the New York State Constitution and the Fourteenth Amendment to the United States Constitution in that New York lacked a jurisdictional nexus upon which to subject DISC's income to tax, and would impose an undue burden on interstate and foreign commerce in violation of Article I, Section 8, of the United States Constitution.

(11) Alternatively, even if DISC's income could properly be taxed by New York, Westinghouse contends that the proposed increase in Westinghouse's entire net income for 1972 by $13,390,500 is erroneous in part since all but $13,030,500 of DISC's taxable income for 1972 was already included in

* In fact, the DISC's accumulated DISC income for 1972 was $13,030,500, rather than $13,390,500.

Westinghouse's entire net income for such year as reported. The auditor's proposed increase in Westinghouse's entire net income is thus $360,000 too high. Of this amount, $22,984.03 was allocated by the auditor to New York, using a business allocation percentage of 6.384454%. As a result, the amount of the alleged tax deficiency for 1972 is overstated by $2,068.56.

(12) In addition, Westinghouse contends that even if DISC's income could properly be taxed by New York, all of DISC's accumulated DISC income for 1972 and 1973 allocable to New York upon which Westinghouse is deemed subject to tax must be eligible for the credit under Section 210(13)(a) of the Tax Law. Section 210(13)(a), in limiting eligibility for credit thereunder to such income attributable to shipments from a regular place of business in New York, violates the New York State and United States Constitutions in the following respects:

> (a) it discriminates against taxpayers who do not have a regular place of business in New York, or whose shipments of export property are made principally from outside the State, in violation of the equal protection and due process clauses of Article 1, Sections 6 and 11 of the New York State Constitution and the Fourteenth Amendment to the United States Constitution; and
>
> (b) by granting a credit only with respect to shipments from a regular place of business in New York, Section 210(13)(a) deters taxpayers from making shipments of export property from locations outside the State by placing those who do at a competitive disadvantage, and thus imposes an undue burden on the free flow of both interstate and foreign commerce in violation of Article I, Section 8 of the United States Constitution.

(13) $831,926.28 of DISC's accumulated DISC income for 1972, and $1,752,561.90 of such income for 1973, would be allocable to New York using the business allocation percentages of 6.384454% for 1972 and 6.234494% for 1973 as computed in the Notices of Deficiency. The respective credits under Section 210(13)(a) computed on the basis of these amounts would be $52,411.36 for 1972 and $110,411.40 for 1973. The auditor should therefore have allowed Westinghouse additional credits of $49,841.59 and $104,313.18 for

1972 and 1973 respectively and, as a result of his failure to do so, the alleged deficiencies in Westinghouse's tax for such years are overstated by such amounts.

(14) Further, it is Westinghouse's contention that it is entitled to refunds of $167,618 and $74,851, for 1972 and 1973, representing the tax paid by Westinghouse with respect to the deemed distributions by DISC for such years, plus interest, on the ground that since dividends derived from subsidiary capital are generally not subject to tax in New York, the State may not tax actual or deemed dividend distributions of subsidiaries engaged in export activities differently from dividends of all other subsidiaries. To do so would constitute a violation of the equal protection clauses of Article 1, Section 2 of the New York State Constitution and the Fourteenth Amendment to the United States Constitution and would impose an undue burden on foreign commerce in violation of Article I, Section 8 of the United States Constitution.

In the Matter of the Petition

of

WESTINGHOUSE ELECTRIC CORPORATION **ANSWER**

for Redetermination of Deficiency in Franchise Tax on Business Corporations Under Article 9A of the Tax Law for the Years 1972 and 1973.

The Department of Taxation and Finance as and for its answer to the taxpayer's perfected petition states the following:

A. The Department of Taxation and Finance denies:

1. That it was erroneous to include in petitioner's entire net income certain income from Westinghouse Electric Corporation ("DISC").

2. That the Bureau erred in calculating the credit the petitioner was entitled to under section 210(13)(a) of the Tax Law by limiting eligibility for such credit to income attributable to shipments from a regular place of business in New York.

3. That the petitioner is entitled to a refund of $167,618 for 1972 and $74,851 for 1973, representing the tax paid by petitioner with respect to deemed distributions by Westinghouse Electric Export Corporation for such years, plus interest.

4. That the DISC was not subject to New York jurisdiction, at least as far as requiring it to be consolidated with its parent for tax purposes.

5. All of the taxpayer's claims of unconstitutionality as to various parts of the Tax Law in regard to the taxation of a DISC.

6. That the taxpayer is entitled to additional credits under section 210(13)(a) of $49,841.59 for 1972 and $104,313.18 for 1973 for DISC's sales not shipped from the taxpayer's regular place of business in New York.

B. The Department of Taxation and Finance admits that the Department of Taxation and Finance erred in using the amount of $12,596,500 as the deemed dividend instead of the actual deemed dividend of $12,956,500 for the year 1972.

C. The Department of Taxation and Finance affirmatively states the following:

1. That the tax due for 1972 should be $71,970, due to the transposition of numbers admitted above by the auditors in the deemed dividend.

2. That the Tax Law is presumed constitutional in administrative hearings.

WHEREFORE, the Department of Taxation and Finance asks that the petition be denied except to the extent of the errors admitted above, the notice of determination be affirmed as modified for the year 1972 as requested above.

/s/.....
Deputy Counsel

Albany, New York
Dated: November 7, 1977

STATE OF NEW YORK
DEPARTMENT OF TAXATION AND FINANCE
STATE TAX COMMISSION

In the Matter of the Petition

of

WESTINGHOUSE ELECTRIC CORPORATION

for a Redetermination of a Deficiency or for Refund of Corporation Franchise Taxes under Article 9A of the Tax Law for the Years 1972 and 1973.

APPEARANCES:

FOR THE TAXPAYER:
CRAVATH, SWAINE & MOORE, ESQS.
One Chase Manhattan Plaza
New York, New York 10005
BY: HENRY W. DE[K]OSMIAN, ESQ.
—and—
PATRICIA GEOGHEGAN,
Of Counsel

FOR THE CORPORATION TAX BUREAU:
PETER J. CROTTY, JR., ESQ.
Counsel, Department of Taxation and Finance
State Campus
Albany, New York 12227
BY: JAMES MORRIS, ESQ.,
Of Counsel

FOR THE STATE TAX COMMISSION:
JULIUS BRAUN, ESQ.
Hearing Officer

FORMAL HEARING held at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on Wednesday, January 18, 1978, at 1:15 P.M.

[2] THE HEARING OFFICER: This is a formal hearing in the matter of Westinghouse Electric Corporation for a redetermination of a deficiency or for refund of corporation franchise taxes under Article 9A of the Tax Law for the Years 1972 and 1973.

Now, sir, this is the procedure we will follow:

The Tax Bureau will put into evidence what is known as the jurisdictional papers in this case. This is done so we know what the issues are before us.

After that, you, the petitioner, may present sworn testimony and documentary material in support of your petition.

Any witness testifying is, of course, subject to cross-examination.

Following that, the Tax Bureau may present such witnesses as it desires in support of its position.

In connection with the presentation of your case, I wish to remind you of two factors. First the burden of proof is upon the petitioner; second, at prior formal or [3] informal conferences or by mail you may have submitted documentary materials to the Tax Bureau. If you wish them to be considered by the State Tax Commission at this hearing, you must introduce them into evidence.

At the conclusion of testimony each side may have brief argument as to law and facts, and you may file formal briefs after you receive the record of this hearing. Let me know at the conclusion of this hearing.

The Corporation Tax Bureau may proceed.

MR. MORRIS: I offer as my first exhibit, copies of notice of deficiencies corporation tax due for the period ended 12/31/72 and 12/31/73.

MR. DE KOSMIAN: No objection.

THE HEARING OFFICER: It will be received and marked Department's Exhibit A.

MR. MORRIS: I offer collectively as the second exhibit, the statement of audit adjustments for the years 12/31/72, 12/31/73; the audit adjustments are annexed to the corporate returns; franchise tax reports of Westinghouse Electric Corporation [4] for the same years.

MR. DE KOSMIAN: I have no objection.

THE HEARING OFFICER: The statement of audit adjustments together with the franchise tax reports for the period in issue will be received as Department's Exhibit B in evidence.

MR. MORRIS: I offer collectively as my next exhibit, petition of Westinghouse Electric Corporation, the perfected petition of Westinghouse Electric Corporation, and the answer of the Department of Taxation and Finance to the perfected petition.

MR. DE KOSMIAN: No objection.

THE HEARING OFFICER: We will mark the petition as Department's Exhibit C in evidence.

The perfected petition will be marked as Exhibit D.

The answer will be marked as Department's Exhibit E in evidence.

MR. MORRIS: I offer as my next exhibit, field audit report of Westinghouse Electric Corporation, again covering the same [5] subject years, 1972 and 1973, and annexed thereto is supporting schedules A, B, C and D.

THE HEARING OFFICER: The field audit report and the attachments as described by Mr. Morris will be received as Department's Exhibit F in evidence.

MR. MORRIS: I offer as my next exhibit, a power of attorney giving the power to the representatives here today

from the corporation to represent them before the State Tax Commission.

MR. DE KOSMIAN: No objection.

THE HEARING OFFICER: The power of attorney is received in evidence as Department's Exhibit G.

MR. MORRIS: I offer as my next exhibit, a stipulation of facts from the representative of the taxpayer and for the Department of Taxation and Finance. It's signed by Mr. De Kosmian, counsellor for the petitioner, and signed by Mr. Art Rosen, deputy counsel for the Department of Taxation and Finance; annexed thereto is a [6] carbon letter which sets forth our agreement as to documents which I will provide today at the hearing.

THE HEARING OFFICER: Did you?

MR. MORRIS: I have so provided, yes, Mr. Hearing Officer.

THE HEARING OFFICER: The stipulation is received in evidence and marked as Department's Exhibit H.

MR. MORRIS: That concludes the introduction of the jurisdictional documents.

THE HEARING OFFICER: What is the issue?

MR. MORRIS: The issue as the Department sees it concerns a reporting of income from DISC under Section 208.9-i(a) and (b) of the Tax Law.

It's the Department's position that in the audit performed that they properly applied Section 208.9 and required the taxpayer to file on a consolidated basis the taxpayer Westinghouse Electric with their DISC corporation and include the income thereon on a consolidated basis.

[7] The taxpayer argues that our statutory scheme is unconstitutional—

THE HEARING OFFICER: He will state his own position.

What is the relationship between DISC and the petitioner, Westinghouse Electric Corporation?

MR. DE KOSMIAN: The DISC was a subsidiary, a wholly owned subsidiary of Westinghouse Electric Corporation. The DISC's name, if you want it for the record, was Westinghouse Electric Export Corporation.

THE HEARING OFFICER: Do you want to present anything at this hearing?

MR. DE KOSMIAN: Basically, we are attacking the constitutionality of the New York State franchise tax on business corporations as applied to DISC's. I think all of the facts have been fully stipulated and are also reflected in the other documents that have just been introduced into evidence.

Just for the record, I might say that the DISC acted as commission agent in connection with export sales for Westinghouse [8] Electric Corporation and various affiliates of Westinghouse Electric Corporation, and it received a commission from Westinghouse Electric Corporation or its affiliates, as the case might be, with respect to export sales that those corporations made for these particular years 1972 and 1973.

Under the New York statute a DISC is exempt from New York franchise tax, but all of its income is taxed to the parent corporation, in this case Westinghouse Electric Corporation.

Our basic contention is that this is an unconstitutional provision and that there is no authority to tax Westinghouse Electric Corporation on the income of the DISC. The DISC itself, as has been stipulated, was not engaged in business in New York, had no offices here, had nothing here.

That is our basic contention.

We have a number of alternative arguments which are set forth in the petition, in the perfected petition. I don't know whether you want me to summarize the [9] alternative arguments that we are making.

THE HEARING OFFICER: Put that in a brief.

MR. DE KOSMIAN: I think they are all reflected in the papers that have already been filed.

THE HEARING OFFICER: If you wish to file a brief 30 days from now, you may. If you want more time you can request the same and you will have an additional amount of time for reply brief.

MR. MORRIS: I would like to mention for the record, it is within the stipulation and within the department's answer that there was a transposition of figures upon audit, where the auditor transposed two numbers, and that we have stipulated, and both in the stipulation of facts and the answer that the figures on the notice of deficiency are in error and that the basic tax due were the taxpayer to lose, the figures are in error from the figures asserted on the notice of deficiency in the statement of audit changes.

[10] MR. DE KOSMIAN: Right, that is correct. That was a mathematical error that the auditor made, a transposition error.

I don't know whether what I am about to say now requires any further filing of documents or whether I can just put it in the record here. But I would like to say that in our perfected petition, and I think also in the original petition we are claiming refunds of taxes paid by Westinghouse Electric Corporation for 1972 and 1973.

Those figures, assuming we are right in that contention, were unfortunately transposed, the amount we are claiming for '72 should have been claimed for '73 and vice versa. That appears on the second page of the perfected petition, paragraph 4, where we assert a refund of $167,618 for 1972, and $74,851 for 1973. That was a

transposition error and it should be the opposite; the lower figure for '72 and the higher figure for '73.

I think that's sufficient.

I might add, that because of the fact [11] that we are making various alternative arguments in addition to our basic argument, it would be very difficult without making seven or eight different alternative computations to determine what the correct amount of the refund or deficiency might be, depending on how those various arguments are resolved.

Therefore, we have stipulated that when there is an ultimate resolution on the merits, then we will calculate the refunds and deficiencies.

MR. MORRIS: Depending on the different alternatives that may be allowed or disallowed, that the operating bureau could calculate the correct amount is due and owing either to the State or to the taxpayer based upon the determinations to be made on the law and it is so stated in the stipulation.

THE HEARING OFFICER: Are the remarks made by counsel in the stipulation as to the error in the transposition?

MR. MORRIS: I am not sure whether that is in the stipulation.

[12] THE HEARING OFFICER: Do you know, counsellor?

MR. DE KOSMIAN: That is not.

THE HEARING OFFICER: It's in the record. Is there anything else?

MR. DE KOSMIAN: There is one other point I would like to make.

We have an additional alternative argument that we would like to make, which was not reflected in our petition.

And I don't know whether you want me to amend the petition or not.

It doesn't involve the introduction of any new facts, it's simply an alternative argument. That argument is basically as follows:

As I mentioned earlier, the DISC, Westinghouse Electric Export Corporation, got commission income from Westinghouse Electric Corporation, the taxpayer in this proceeding, in respect of sales, export sales made by Westinghouse Electric Corporation.

In addition, the DISC got commissions from export sales made by various affiliates [13] of Westinghouse Electric Corporation in respect of export sales made by those affiliates.

The State has allocated to Westinghouse Electric Corporation, the taxpayer in this proceeding, all of the commission income of the DISC, including the commission income of the DISC in respect of sales made by affiliates of Westinghouse and paid by those affiliates.

It has been stipulated, I believe, that none of those affiliates were engaged in business in New York or subject to the jurisdiction of New York.

We would like to make the additional argument, which, of course, is irrelevant if we prevail on our basic argument, that even if it is proper to allocate to Westinghouse Electric Corporation the commissions which the DISC received from Westinghouse Electric Corporation in respect of export sales made by it, that even if that is proper, which we of course contend [14] is not, that it is nevertheless improper to allocate to Westinghouse Electric Corporation the commissions which the DISC earned from export sales made by the affiliates of Westinghouse Electric Corporation.

That argument was not made in our petition. I think all of the facts necessary to support the argument are contained in the documents that have been filed.

I don't know whether you want me to make a formal motion to amend our petition to make—

THE HEARING OFFICER: No, you have made it on the record.

MR. DE KOSMIAN: That's all I wanted to know.

THE HEARING OFFICER: Do you want to say anything?

MR. MORRIS: No, Mr. Hearing Officer.

THE HEARING OFFICER: All right. 30 days or 45 days, with that reasonable time, to file a brief after receipt of the record.

This hearing is closed.

EXHIBITS

Department's		In Evid.
A	Copies of notice of deficiencies for periods ended December 31, 1972 and December 31, 1973	3
B	Statement of audit adjustments for the years December 31, 1972 and December 31, 1973, together with franchise tax reports	4
C	Petition	4
D	Perfected petition	4
E	Answer	E
F	Field audit report and attachments	5
G	Power of attorney	5
H	Stipulation of facts	6

DECISION OF THE STATE TAX COMMISSION

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

of

WESTINGHOUSE ELECTRIC CORPORATION

for Redetermination of a Deficiency or for Refund of Franchise Tax on a Business Corporation under Article 9-A of the Tax Law for the Years 1972 and 1973.

DECISION

Petitioner, Westinghouse Electric Corporation, Gateway Center, Pittsburgh, Pennsylvania 15225, filed a petition for redetermination of a deficiency or for refund of franchise tax on a business corporation under Article 9-A of the Tax Law for the years 1972 and 1973 (File No. 17433).

A formal hearing was held before Julius E. Braun, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 18, 1978 at 1:15 P.M. Petitioner appeared by Cravath, Swaine and Moore, Esqs. (Henry W. DeKosmian, Esq. and Patricia Geoghegan, Esq., of counsel). The Corporation Tax Bureau appeared by Peter Crotty, Esq. (James Morris, Esq., of counsel).

ISSUE

Whether section 208.9(i)(B) of the Tax Law which required petitioner to consolidate the receipts, expenses, assets and liabilities of its wholly owned subsidiary, Westinghouse Electric Export Corporation (a "DISC" corporation), with its own, in computing its New York income tax liability, is constitutional.

FINDINGS OF FACT

1. On June 15, 1976 pursuant to a field audit, the Corporation Tax Bureau issued a Statement of Audit Adjustment to petitioner, Westinghouse Electric Corporation, for the periods ending December 31, 1972 and December 31, 1973, assessing additional tax. Accordingly, a Notice of Deficiency was issued on the same day for $73,970.23, plus interest of $18,026.55, for a total of $91,996.78, for the period ending December 31, 1972, and $151,436.76, plus interest of $25,547.38, for a total of $176,984.14 for the period ending December 31, 1973. Due to the transposition of numbers by the auditor, the tax due should be $71,970.00, plus interest, for the period ending December 31, 1972.

2. Petitioner, Westinghouse Electric Corporation, and the Corporation Tax Bureau stipulated and agreed as follows:

a. Petitioner, Westinghouse Electric Corporation ("Westinghouse"), is a Pennsylvania corporation which does business in New York State.

b. Westinghouse Electric Export Corporation ("DISC") is a Delaware corporation which elected to be treated as a domestic international sales organization for Federal income tax purposes and was so treated for the years 1972 and 1973.

c. Westinghouse owns all the stock of DISC.

d. Westinghouse and DISC keep their records on the accrual method of accounting.

e. During 1972 and 1973, DISC qualified under Section 992(a) of the Internal Revenue Code of 1954 (the "Code") and was exempt from Federal income tax for such years under Section 991 of the Code.

f. DISC was commission agent for Westinghouse and affiliated companies in respect of export sales of property and related services. All of DISC's business income for 1972 and 1973 consisted of commissions paid it in respect of

export sales of products and related services by Westinghouse and other affiliated companies.

g. DISC reported total income on Federal Form 1120-DISC for 1972 and 1973 in the amounts of $25,987,000 and $57,948,738, respectively. Of DISC's total 1972 income, $19,888,000 was received from Westinghouse and $6,099,000 was received from other affiliated companies not doing business in New York State.

h. DISC did not make any distributions to Westinghouse in 1972. DISC distributed $10,068,500 to Westinghouse in 1973, all of which was treated as made out of previously taxed income under Section 996(a)(1) of the Code.

i. $12,956,500 of DISC's total income for 1972 and $29,838,006 of its taxable income for 1973 was deemed distributed by DISC to Westinghouse in 1972 and 1973, respectively, under Section 995(b) of the Code and Westinghouse included those amounts in its Federal gross income for 1972 and 1973. Federal taxation of the remainder of DISC's total income for 1972 and 1973 (the "accumulated DISC income") was deferred under the DISC provisions of the Code.

j. During 1972 and 1973, DISC had no paid employees, did not engage in any business activities in New York, nor did it employ capital, own or lease real or tangible personal property, pay real estate rentals, or maintain an office in New York State at any time during such years.

k. DISC did not file a New York corporate franchise tax return for either 1972 or 1973 because it and Westinghouse take the position that DISC was not subject to New York jurisdiction.

l. Westinghouse filed Form CT-3 with the State of New York for 1972 and 1973 as a Pennsylvania corporation doing business in New York. Its reported entire net income for 1972 and 1973 was $136,516,711 and

$43,715,850, respectively, which included the $12,956,500 and $29,838,006 deemed distributions from DISC for those years but did not include any portion of DISC's accumulated DISC income for such years. The deemed distributions were allocated to New York according to Westinghouse's business allocation percentages of 6.387743% for 1972 and 6.239516% for 1973, computed without regard to such deemed distributions.

m. In separate Notices of Deficiency dated June 15, 1976, the Corporation Tax Bureau of the Department of Taxation and Finance alleged deficiencies in Westinghouse's corporate franchise tax of $73,970.23 for 1972 and $151,436.76 for 1973.

n. The entire amount of the alleged deficiencies relates to Westinghouse's treatment of the total income of DISC for 1972 and 1973 on Westinghouse's own returns.

o. The alleged deficiencies were computed as follows:

(1) Because more than 5% of DISC's gross receipts in both 1972 and 1973 consisted of sales commissions from Westinghouse, DISC would have been exempt from New York franchise tax under Section 208.9(i)(A) of Chapter 60, Article 9-A of the New York Tax Law whether or not New York otherwise had jurisdiction to subject it to tax. It is therefore alleged in the Notices of Deficiency that Westinghouse is required under Section 208.9(i)(B) of the Tax Law to consolidate DISC's receipts, expenses, assets and liabilities with its own in computing its New York income tax liability, excluding all transactions between Westinghouse and DISC.

(2) Since Westinghouse only included the deemed distributions from DISC for 1972 and 1973, and not the DISC's accumulated DISC income for such years, in its own entire net income for 1972 and 1973, it is proposed in the Notices of Deficiency that

Westinghouse's entire net income for 1972 be increased by $13,390,500 from $136,516,711 to $149,907,211 and that its entire net income for 1973 be increased by $28,110,732 from $43,715,850 to $71,826,582. In addition, it is proposed in the Notices of Deficiency that the receipts factors used to compute Westinghouse's business allocation percentages for 1972 and 1973 be recomputed by adding DISC's commission income derived from customers other than Westinghouse (which other customers did not do business in New York and were not subject to New York tax) for such years to the denominator of such factors, but not to the numerator, thus reducing Westinghouse's receipts factor for 1972 from 5.945712% as reported on its 1972 return, to 5.935845% and reducing its receipts factor for 1973 from 5.665182%, as reported on its 1973 return, to 5.650114%. Such a calculation results in a reduction of Westinghouse's business allocation percentage for 1972 from 6.387743% to 6.384454% and for 1973 from 6.239516% to 6.234494%. The net effect of the two proposed adjustments for 1972 described above increased Westinghouse's business income for 1972 allocable to New York from $8,683,334 to $9,533,778, an increase of $580,444, with a resulting deficiency in tax for 1972 of $76,539.96. Similarly, the net effect of the two proposed adjustments for 1973 described above increased Westinghouse's business income for 1973 allocable to New York from $2,702,912 to $4,453,304, an increase of $1,750,392, with a resulting deficiency in tax for 1973 of $157,535.28.

(3) It is proposed in the Notice of Deficiency, however, that Westinghouse be allowed credits under Section 210(13)(a) of the Tax Law in the respective amounts of $2,569.77 and $6,098.22 for 1972 and 1973. Such credits were computed by first multiplying $13,390,500 and $28,110,732, representing the DISC's accumulated DISC income for 1972 and 1973

respectively, as computed by the auditor, by 4.771297% and 5.523182%, respectively, those being the percentages of Westinghouse's receipts from export property on which DISC earned a sales commission and which was shipped from a regular place of business of Westinghouse in New York as compared to Westinghouse's total receipts on the sale of export property for such years for which DISC received a sales commission. Such total receipts amounted to $223,587,000 in 1972 and $408,080,000 in 1973.

(4) The respective products, $638,901 for 1972 and $1,552,607 for 1973, were then multiplied by Westinghouse's revised business allocation percentages for the respective years, with the result that of the $13,390,500 and $28,110,732 alleged to be includable in Westinghouse's entire net income for 1972 and 1973, respectively, only $40,790 and $96,797 respectively, was found to be eligible for credit under Section 210(13)(a). These amounts were then multiplied first by 70% and then by the 9% rate of tax in effect for 1972 and 1973 to arrive at credits of $2,569.77 and $6,098.22 for 1972 and 1973, respectively.

p. Westinghouse paid franchise tax under Article 9-A of the Tax Law in the amounts of $749,384 and $205,548, respectively, for 1972 and 1973. The taxes so paid by Westinghouse reflected the inclusion in its business income for 1972 and 1973 of the deemed distributions in the amounts of $12,956,500 and $29,838,006 for 1972 and 1973, respectively.

q. With respect to Westinghouse's assignment of error number 2 of the Perfected Petition, the Department of Taxation and Finance for the State of New York concedes that the proposed increase in Westinghouse's entire net income for 1972 under the State's theory should be $13,030,500 rather than $13,390,500 and that therefore the proposed deficiency for 1972 is $71,970.

r. The parties agree to reserve the calculation of the amount of any deficiency or refund until ultimate resolution of the issues raised in Westinghouse's petition.

s. The petition in this action was timely filed on September 10, 1976.

CONCLUSIONS OF LAW

A. That the constitutionality of the laws of the State of New York is presumed at the administrative level. Accordingly, the State Tax Commission does not have jurisdiction to declare such laws unconstitutional and it must be presumed that section 208.9(i)(B) of the Tax Law is constitutional to the extent that it relates to the imposition of the tax which is the subject of this proceeding.

B. That the petition of Westinghouse Electric Corporation is denied and the notices of deficiency issued June 15, 1976, are sustained.

DATED: Albany, New York
August 31, 1979

STATE TAX COMMISSION

/s/ JAMES H. TULLY, JR.
President

/s/ MILTON KOERNER
Commissioner

/s/ THOMAS H. LYNCH
Commissioner

ORDER OF THE NEW YORK SUPREME COURT

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the Courthouse, in the City of Albany, New York, on the 25th day of January, 1980.

PRESENT:

Hon. EDWARD S. CONWAY,
Justice.

In the Matter of the Application of
WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules
—against—

JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH, as the Tax Commission of the State of New York,
Respondents.

ORDER

Index No. 11313-79

Upon reading and filing the notice of petition and petition of Westinghouse Electric Corporation, verified the 18th day of December, 1979, and the answer and return of the respondents, verified the 10th day of January, 1980, and it appearing that one of the issues involved is whether the determination of the respondents made as a result of a hearing and at which evidence was taken pursuant to direction by law is, on the entire record, supported by substantial evidence, and due deliberation having been had,

Now, upon motion of Robert Abrams, Attorney General of the State of New York, attorney for respondents, it is

ORDERED, that pursuant to section 7804(g) of the Civil Practice Law and Rules, the above-entitled proceeding be and the same hereby is transferred to the Appellate Division of the Supreme Court, Third Judicial Department, for disposition.

Dated: Albany, New York
January 25, 1980

/s/ EDWARD S. CONWAY
J.S.C.

ENTER:

DECISION OF THE APPELLATE DIVISION, SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT

June 18, 1981 No. 39582

In the Matter of WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

JAMES H. TULLY, JR., et al., Constituting the Tax Commission of the State of New York,
Respondents.

Proceeding pursuant to CPLR article 78 (transferred to this court by order of the Supreme Court at Special Term, entered in Albany County) to review a determination of the State Tax Commission, which sustained corporate franchise tax assessments imposed pursuant to article 9-A of the Tax Law.

The principal issue presented is whether section 208 (subd. 9, par. [i], subpar. [B]) of the Tax Law is unconstitutional insofar as it purports to tax the accumulated income of a domestic international sales corporation (DISC), an entity which is the beneficiary of certain tax advantages under the Internal Revenue Code. A related issue concerns the obligation of a corporation doing business in New York, which is a shareholder of a DISC, when calculating its own income for state franchise tax purposes, to include income deemed to have been distributed to it by the DISC. The facts have been stipulated.

Petitioner, Westinghouse Electric Corporation (Westinghouse), a Pennsylvania corporation, does business in New York. It owns all of the stock of Westinghouse Electric Export Corporation (Westinghouse DISC), a Delaware corporation,

which acted as a commission agent for Westinghouse and affiliated companies, and which in 1972 and 1973 had qualified for DISC status under the Internal Revenue Code (U.S. Code tit. 26 § 991 *et seq.*). Westinghouse DISC's business income consisted entirely of commissions derived from export sales of products and related services made on behalf of Westinghouse and affiliated companies. Throughout this period it did not engage in any business activities in New York.

Under the provisions of the Internal Revenue Code, Westinghouse DISC itself was exempt from Federal income tax liability. However, a portion of its earnings and profits was "deemed distributed" to its shareholder (Westinghouse), whether or not it was actually distributed, and was directly taxable to the latter as a dividend (U.S. Code, tit. 26, § 995, subd. [b]). Federal taxation of the remainder of Westinghouse DISC's income, characterized as "accumulated income", was deferred. When Westinghouse filed its New York corporation franchise tax returns for these years, it included the deemed distributions from Westinghouse DISC in its net income, but not any portion of the DISC's accumulated income.

The State Department of Taxation and Finance charged that deficiencies existed in the amount of franchise tax due from Westinghouse. Specifically, the department, relying on section 208 (subd. 9, par. [i], subpar. [B]) of the Tax Law, maintained that in arriving at its franchise tax Westinghouse should have combined all of Westinghouse DISC's income and expenses with its own, other than transactions between the two companies. Except for correcting an arithmetic error, respondents rejected Westinghouse's petition challenging the deficiencies and this proceeding followed.

We determine that section 208 (subd. 9, par. [i], subpar. [B]) of the Tax Law, to the extent it requires Westinghouse DISC's accumulated income be added to petitioner's income, is unconstitutional, for it settles an impermissible burden on foreign commerce (U.S. Const., art. 1, § 8, cl. [3]).

Enacted in 1971, sections 991 through 997 of the Internal Revenue Code created DISCs, a new class of corporation.

These corporations, receiving special tax treatment, derive substantially all of their income from export sales of properties manufactured in the United States, including commissions attributable to such sales. The essential purpose behind enactment of the DISC provisions was to encourage exportation to foreign countries of American made products so as to alleviate a burgeoning deficit in the United States balance of payments (*Caterpillar Tractor Co. v. United States*, 589 F.2d 1040). A correlative concern, expressed by the Senate Finance Committee, was to remove a competitive disadvantage experienced by domestic corporations engaged in export activities (S. Rep. No. 92-437, 92nd Cong., 1st Sess. 90 [1971] reprinted in [1971] U.S. Code Cong. & Admin. News, pp. 1918, 1996). The DISC provisions of the Code being unmistakably aimed at improving foreign commerce, any state impediment hindering that congressional intent is not constitutionally allowable.

In the calculation of the New York State franchise tax, section 208 (subd. 9, par. [i], subpar. [B]) of the Tax Law directs that a DISC's shareholder's attributable share of each receipt and expense of the DISC be added to the shareholder's income. Since that requires Westinghouse DISC's accumulated income be added to Westinghouse's entire net income, to be taxed thereon, it in effect imposes a tax on Westinghouse DISC's accumulated income, contrary to the congressionally established policy that such income currently be treated as tax exempt. By so computing petitioner's franchise tax, respondents encumber Congress's purpose in creating DISCs, for they diminish the tax advantage Congress bestowed on United States corporations engaged in foreign export trade. Although the Code's DISC provisions do not explicitly prohibit states from directly or indirectly taxing accumulated income, given their purpose it would be incongruous to suggest such a prohibition was not intended. As the State's statute infringes on Congress's power to regulate commerce, it necessarily must fall (*see Boston Stock Exchange v. State Tax Comm.*, 429 U.S. 318; *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414).

Petitioner also maintains that the inclusion of Westinghouse DISC's deemed distributions in Westinghouse's in-

come is invalid on equal protection and due process grounds. Neither claim is convincing.

With regard to its equal protection argument, Westinghouse urges that since dividends from subsidiaries, in general, are not subject to New York franchise tax, respondents have discriminated against it by requiring petitioner to include in its net income deemed distributions from Westinghouse DISC. There is nothing in the record to indicate that petitioner's tax liability resulting from a combined report, which in view of the extensive intercompany transactions could have been required here if Westinghouse DISC had been considered merely as a subsidiary (Tax Law, § 211, subd. 4; *Matter of Wurlitzer Co. v. State Tax Comm.*, 35 N.Y.2d 100), would be less than that which was in fact imposed.

As for the due process argument, Westinghouse maintains Westinghouse DISC neither engaged in business in New York nor participated in any other activities sufficient to justify a jurisdictional nexus and that, therefore, inclusion of the DISC's deemed distributions was improper. But where, as here, the activities of the parent and subsidiary are so interrelated as to constitute a single unitary business, separate geographical accounting is not required for purposes of state taxation and a reasonable apportionment formula fairly representing the amount of business apportioned to the state may be utilized (*Mobil Oil Corp. v. Comr. of Taxes*, 445 U.S. 425).

Determination annulled, with costs, and matter remitted to the State Tax Commission for further proceedings not inconsistent herewith.

MAIN, MIKOLL and YESAWICH, JR., JJ., concur; MAHONEY, P. J., and HERLIHY, J., dissent and vote to confirm in the following memorandum by HERLIHY, J.

HERLIHY, J. (dissenting):

We join in the majority opinion as to the conclusion that the tax at issue herein does not violate the requirements of due process or equal protection.

However, while petitioner's view of the Federal treatment of income derived from domestic corporations engaged in export activities as regulating foreign commerce has some merit, the fact remains that the Internal Revenue Code does not exempt the income from taxation. The tax imposed herein is based upon the taxpayer's relationship to the wholly-owned subsidiary and is unrelated to the subsidiary's function of overseas sales—foreign commerce.

Petitioner has failed to demonstrate any tax imposed on foreign commerce or any implicit prohibition on the power of the State to allocate net income to the shareholder as a portion of income subject to the New York State franchise tax. Upon the present record, the inference that the Internal Revenue Code is an exclusive regulation of foreign commerce is speculative and does not suffice to overcome the presumption of the constitutionality of the New York statute.

The determination of the Tax Commission should be confirmed, and the petition dismissed.

ORDER OF THE APPELLATE DIVISION

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department in the City of Albany, New York, commencing on the 20th day of April 1981.

PRESENT:

Hon. A. FRANKLIN MAHONEY,
Presiding Justice,

Hon. ROBERT G. MAIN,
Hon. ANN T. MIKOLL,
Hon. PAUL J. YESAWICH, JR.,
Hon. J. CLARENCE HERLIHY,
Associate Justices.

In the Matter of the Application of
WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

v.

JAMES H. TULLY JR., MILTON KOERNER and THOMAS H. LYNCH, as the Tax Commission of the State of New York,
Respondents.

Albany County Clerk's Index No. 11313/79

Order of Annullment

The above-named petitioner, having instituted this proceeding in the Supreme Court, Albany County, pursuant to Article 78 of the Civil Practice Law and Rules, to review a determination of respondents, dated August 31, 1979, which sustained the imposition of corporate franchise tax assessments

imposed pursuant to Article 9-A of the Tax Law and said proceeding having been transferred for disposition to the Appellate Division, Third Department, by order of the Supreme Court, Albany County, dated and entered on January 25, 1980, and having been presented during the above-stated Term of this Court, and having been argued by Cravath, Swaine & Moore (Henry W. de Kosmian, of counsel), for petitioner, and by Robert Abrams, Attorney General of the State of New York (Francis V. Dow, Assistant Attorney General, of counsel), for respondents, and after due deliberation the Court having rendered a decision on the 18th day of June, 1981, Mahoney, Presiding Justice and Herlihy, Justice, dissenting, it is hereby

ORDERED, that the determination be and the same hereby is annulled, with costs, and the matter is remitted to the respondent Tax Commission of the State of New York for further proceedings not inconsistent with the June 18, 1981, decision of this Court.

ENTER:

JOHN J. O'BRIEN
Clerk

DATED AND ENTERED: June 29, 1981.

A TRUE COPY
/s/ JOHN J. O'BRIEN
Clerk

DECISION OF THE COURT OF APPEALS

COURT OF APPEALS
STATE OF NEW YORK

No. 97

In the Matter of WESTINGHOUSE ELECTRIC CORPORATION,

Respondent-Appellant,

v.

JAMES H. TULLY, JR., et al., constituting the Tax Commission of the State of New York,

Appellants-Respondents.

Argued February 9, 1982; decided April 1, 1982

Robert Abrams, Attorney-General (Francis V. Dow and Shirley Adelson Siegel of counsel) for appellant.

Henry W. deKosmian and Simon Friedman, for respondent.

OPINION OF THE COURT

FUCHSBERG, J.:

In an article 78 proceeding to review a determination of the State Tax Commission which sustained corporate franchise taxes imposed pursuant to Article 9-A of the Tax Law, we are called upon to pass on the constitutionality of New York statutes which tax income emanating from the earnings of a "domestic international sales corporation" (hereinafter referred to by the acronym "DISC"), a class of corporations newly made eligible for preferential tax treatment by the Federal Revenue Act of 1971.

The primary requirement for qualification as a DISC is that a corporation must derive at least 95 per cent of its income from export sales and related services. The tax advantages it receives are intended to encourage the export of goods manufactured in the United States by compensating for the far lower taxes many foreign subsidiaries of American companies pay to the nations in which they operate (*see* H. Rep. No. 92-533, 92d Cong., 1st Sess., [1971], reprinted in US Code Cong. & Admin. News 1825, 1872; S. Rep. No. 92-437, 92d Cong., 1st Sess., [1971], reprinted in US Code Cong. & Admin. News 1918, 1928, 1996). To effect the contemplated tax benefit, the implementing statute, besides exempting a DISC from Federal taxation, permits half of its income to be "accumulated" without subjecting its shareholders to current Federal taxes. On the other hand, the other half is "deemed distributed" to the shareholders even if it in fact is not paid out as a dividend (*see* US Code, tit 26, § 991 *et seq.*).[1]

The DISC involved in the present proceeding, a Delaware corporation named Westinghouse Electric Export Corporation, is a wholly-owned subsidiary of Westinghouse Electric Corporation (Westinghouse), a Pennsylvania corporation which does business in New York. It is undisputed that all of the DISC's business income for 1972 and 1973, the years under review here, was earned as commission agent for either Westinghouse or the latter's affiliates.[2] Moreover, it is agreed that none of the usual incidents of a nexus with New York applied to the DISC, it having operated no office, engaged no employees, conducted no business activities, employed no capital and neither owned nor leased real or tangible personal property. Concordantly, it did not file New York franchise tax returns.

It was against this background that, when Westinghouse filed its 1972 and 1973 New York franchise tax returns, though it

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[1] Since no questions are raised as to the tax ramifications of an actual distribution of DISC income or the eventual taxability of the accumulated DISC income, we do not treat with such issues in this opinion.

[2] None of the affiliates did business in New York.

included its "deemed distributions" from the DISC in its "entire net income" (*see* Tax Law, § 208.9[a][1]), it did not charge itself with any portion of the "accumulated" DISC income. Finding these returns deficient, New York State's Department of Taxation and Finance took the position that Westinghouse, in its treatment of the DISC income, had failed to comply with Tax Law, § 208.9(i)(B), which, in essence, requires a reporting corporation to compute its "entire net income" by consolidating its DISC's receipts, expenses, assets and liabilities with its own, save for transactions between it and its DISC. Such consolidation, of course, would have added the accumulated DISC income which had been deferred for Federal tax purposes.[3] Against the deficiency assessed on this basis, the Department did allow Westinghouse a DISC export credit for merchandise "shipped from a regular place of business of the taxpayer within this state", all pursuant to a formula set out in section 210.13(a) of the Tax Law (*see infra* p. 7).

In its petition for a redetermination, Westinghouse alleged that inclusion of accumulated DISC income in its "entire net income" would impose an undue burden on interstate and foreign commerce (US Const, art I, § 8, cl 3);[4] that, in violation

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[3] Tax Law § 208.9(i)(B), in pertinent part, reads: "[A]ny taxpayer required to compute a tax under this article, which during the taxable year being reported was a stockholder in any DISC . . . shall . . . adjust each item of its receipts, expenses, assets and liabilities, as otherwise computed under this article, by adding thereto its attributable share of each such DISC's receipts, expenses, assets and liabilities . . . provided, however, (1) that all transactions between the taxpayer and each such DISC shall be eliminated from the taxpayer's adjusted receipts, expenses, assets and liabilities; (2) that the taxpayer's entire net income as otherwise computed under this section, shall be reduced by subtracting the amount of the deemed distribution of current income, if any, from each such DISC already included in the entire net income of such taxpayer by virtue of having been included in its entire taxable income for that taxable year as reported to the United States Treasury Department".

[4] The commerce clause provides that "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

of the due process clauses of the State and Federal Constitutions, New York lacked a jurisdictional nexus upon which to tax the DISC's income; and that, if the DISC's accumulated income had to be included in "entire net income", Tax Law, § 210.13(a), which provides the tax credit, offends the commerce clause because it discriminates against shipments of export property from locations outside the State. In addition, Westinghouse, asserting that State taxation of the deemed distributions of DISC trespassed on due process and equal protection, demanded that the taxes it had paid on such be refunded.[5] The State Tax Commission rejected all of these contentions.

For its part in this proceeding, the Appellate Division, two justices dissenting, found that section 208.9(i)(B), in requiring the DISC's accumulated income to be added to the taxpayer's "entire net income", constituted an unconstitutional imposition on foreign commerce. Having found that 208.9(i)(B) violated the commerce clause, the court did not address Westinghouse's claim that the provision was also invalid for lack of due process. Nor did the court decide the constitutionality of the tax credit of 210.13(a), apparently because this section expressly is made dependent on the validity of 208.9(i)(B). Finally, it rejected Westinghouse's due process and equal protection contentions regarding the inclusion of the deemed distribution income. For the reasons which follow, we believe none of the constitutional objections has merit.

Turning at once to Westinghouse's primary argument —that the addition of the accumulated DISC income to Westinghouse's "entire net income" as called for by Tax Law § 208.9(i)(B) frustrates the efficacy of the Federal tax incentive and, therefore, runs counter to the fundamental policy dictates of the commerce clause—we first pay heed to the well-settled proposition that the ultimate power to regulate both

[5] Westinghouse also contended that the State Tax Commission had transposed certain numbers creating an arithmetical miscalculation of the tax. In its answer, the Commission conceded this error.

foreign and interstate commerce lies with Congress (*see, e.g., Gibbons v. Ogden*, 9 Wheat [22 US] 1,86-87). However, that a State chooses to act in the same field as does Congress does not automatically portend judicial nullification of the State law (*see Walhalla Associates, Inc. v. National Commercial Bank and Trust Co.*, 54 N.Y.2d 857; *see, generally*, Tribe, American Constitutional Law, § 6-24, p. 379). It all hinges on whether Congress intended to preempt State regulation (*see Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229-230).

This said, we note that in the present case there is no explicit statement of preemption. Nor does the statutory scheme imply any such design. True, it bespeaks a plan to give special tax treatment to DISCs and their stockholders in order to encourage export sales of goods manufactured in the United States. But that some benefits were extended to accomplish this end does not mean that every possible kind was intended. To the contrary, even as to Federal taxation, the incentives tendered a DISC's shareholders, the ultimate beneficiaries of a DISC's tax preferment, are far more limited than those offered to the DISC per se.[6]

Most persuasive is the relevant legislative history. This leaves little to implication. On September 8, 1971, shortly before the DISC legislation was enacted, John S. Nolan, Deputy Assistant Secretary of the Treasury for Tax Policy, spokesman for the sponsoring department, in the company of then Secretary of Treasury John B. Connally, officially appeared at a hearing before the Committee on Ways and Means of the House of Representatives. There, Mr. Nolan, in response to an expression of committee concern that the proposal might "prohibit States from levying corporate income taxes on a DISC" was unequivocal in his declaration that the proposed bill would leave the States "free to impose the tax, if they choose to do so" (*see* Hearings before House Committee on Ways and

[6] We also observe that even accumulated DISC income is taxable to the shareholders when it is distributed, when a shareholder sells his stock or when the corporation no longer qualifies as a DISC (*see* US Code, tit 26, § 995).

Means on the Tax Proposals Contained in the President's New Economic Policy, 92nd Cong., lst Sess., Part I, pp. 170-171). Moreover, not without significance, proposed legislation which might have preempted the States from taxing DISCs was considered by the same committee in 1980, only to be permitted to die without any action (*see* HR 5076, 96th Cong., 2nd Sess.; Hearing before Committee on Ways and Means on State Taxation of Foreign Source Income, p. 29, 326). Overall, then, our State is far from constrained by a clear statement that Congress intended to exercise its commerce power in full (*see* Tribe, American Constitutional Law, § 5-8, p. 243).

On this point, comments also are in order on *McGoldrick v. Gulf Oil Corp.* (309 U.S. 414) to which Westinghouse adverts to support its position. There, a Federal statute permitted the importation of crude petroleum into the United States free of import duty. However, the statute specified that the petroleum be imported, converted into fuel oil and then sold solely for fuel in propelling foreign-bound vessels in foreign commerce, all while in bond. These *congressionally-designed* conditions prevented the segregated oil from ever becoming a part of "the common mass of property in the state" (*McGoldrick, supra,* at p. 423). The Supreme Court emphasized that it was this integrated structure for assuring that the oil never left the stream of foreign commerce, which has no parallel in this case, that compelled the conclusion that "while in bonded warehouse, [the oil is] free from state taxation" (*McGoldrick, supra,* at pp. 428-429).

The second prong of Westinghouse's constitutional attack on section 208.9(i)(B) is that, since neither the DISC nor any of Westinghouse's affiliates for which it acted as export commission agent were engaged in business in New York, the State lacked the jurisdictional nexus to satisfy the minimal due process standards on which the right to tax must be predicated. We find this assertion equally without merit. Revealing in this connection is the recent decision in *Mobil Oil Corporation v. Commissioner of Taxes* (445 U.S. 425). In the context of a challenge to Vermont's taxation of dividend income received by

a taxpayer from foreign subsidiaries and affiliates, the court reminded us that in such a case, due process mandates can be met by a State's apportionment formula so long as it is reasonably designed to reflect the percentage of a unitary business' profits connected with the State (*see Mobil Oil, supra,* at pp. 436-440; *cf. American Ins. Assn. v. Lewis,* 50 N.Y.2d 617, 623-624).

Here the record shows that Westinghouse and its DISC were operating a unitary business. Not all the accumulated DISC income was subjected to taxation, but rather only that part allocable to New York (Tax Law, §§ 208.9[i][B], 210.1[a], 210.3; *cf. Fischbach & Moore v. Tax Comm.,* 36 N.Y.2d 605, 607). Moreover, there is nothing in the record to show that the income was improperly apportioned to business done in New York; nor does the taxpayer question our State's allocation formula.[7]

This brings us to the Westinghouse argument that, even if the inclusion of the accumulated DISC income required by section 208.9(i)(B), standing alone, does not contravene the commerce clause, an infringement occurs when it is acted upon by the tax credit provided for in section 210.13(a). It reasons that the effect of the credit is impermissibly to subject its export sales from a non-New York "place of business" to a higher rate of tax than comparable sales "shipped from a regular place of business" within New York.

The credit was devised, by the State on its own, to provide shareholders of DISCs with State tax incentives akin to those which had been enacted by the Federal government (*see* Letter from Norman F. Gallman, Commissioner of Taxation and Finance to Governor Nelson A. Rockefeller in bill jacket [at p.

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[7] Tax Law § 210.3 provides for an allocation of a taxpayer's total business income from all sources by the application of a three-factor formula, the three factors being the fractions represented by a taxpayer's property within New York over all its property, a taxpayer's payroll within New York over its total payroll and a taxpayer's receipts from within New York over its total receipts.

3-4] of L 1972, ch 778; Memorandum of Department of Commerce in bill jacket [at p. 12] of L 1972, ch 778; Division of the Budget Report in bill jacket [at p. 19] of L 1972, ch 778). Such credit was intended to ensure that New York would not lose its competitive position vis-a-vis other States which were also expected to offer tax benefits to DISC owners (*see* Letter from Arthur M. Arnold, Director of Taxation and Governmental Affairs of the Empire State Chamber of Commerce in bill jacket [at p. 28] of L 1972, ch 778; Memorandum in Support by New York Chamber of Commerce in bill jacket [at p. 29] of L 1972, ch 778). While Congress chose to provide the benefit in the form of a tax deferral, our State Legislature elected to use a tax credit.

That a State's tax structure is so used hardly requires an *ipso facto* finding that we have discriminated against multi-state enterprises in favor of intrastate corporations. Rather, States are free to use their taxing power "to encourage the growth and development of intrastate commerce and industry . . . [and to] compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy" (*Boston Stock Exchange v. State Tax Commn.*, 429 U.S. 318, 336-337). That this is what the credit allowed by § 210.13(a) accomplishes, and no more, is demonstrated by a review of how it is calculated.

The first step to be taken to arrive at the amount of such tax credit is to multiply the taxpayer's share of the accumulated DISC income by the taxpayer's New York "business allocation percentage" (Tax Law, § 210.3). This yields the dollar value of the accumulated DISC income allocable to New York as *in-state* earnings. This amount is then multiplied by that percentage which the taxpayer's receipts from export property on which the DISC earned commissions *and* which was shipped from a regular place of business in New York bears to the taxpayer's total receipts from the sale of export property on which the DISC earned commissions. The product of this calculation is the amount eligible for the credit; it is merely a

subdivision of the accumulated DISC income allocable to New York.[8]

Obviously, the business allocation percentage plays an integral role in computing the tax credit. It determines what amount of the taxpayer's income has a jurisdictional nexus with the State. The result is that, when the State exercises its taxing power, it does so consistently with due process mandates (*Northwestern Cement Co. v. Minnesota*, 358 U.S. 450; *Wisconsin v. Penney Co.*, 311 U.S. 435).

But New York need not tax all which it has the right to tax. The credit here simply forgives a portion of that income which New York may tax by reference to shipments of export property from a regular place of business in New York, an additional New York relationship. Such a method clearly satisfies due process, and any effect on interstate commerce is too indirect to run afoul of the commerce clause.

Now, having disposed of the arguments on which Westinghouse seeks to overturn the Tax Commission's assessment, we treat with its claim for reimbursement of its allegedly mistaken payment of tax on the deemed distributions. Its position, again cast in constitutional terms, is that taxation of such income infringes upon both due process and equal protection.

Its alleged due process position is no different from the one it took regarding taxation of accumulated DISC income, *i.e.*, New York lacks a sufficient nexus with the DISC to tax its income. But, since Westinghouse and the DISC are parts of a unitary business and there is an apportionment of the income

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[8] The dollar value of the credit is then determined by multiplying the amount available for the credit by 70% and then by the tax rate (Tax Law, § 210.13[a]). According to a memorandum prepared by the State Department of Commerce before the DISC legislation was enacted, "[t]he 70 percent factor included in the export credit formula [was] apparently designed to minimize revenue loss while still providing some tax incentive for the export business" (Memorandum of Department of Commerce in bill jacket [at p. 12] of L 1972, ch 778).

allocable to New York, there is no due process violation (*Mobil Oil Corporation v. Tax Commissioner*, 445 U.S. 425, *supra*).

As for equal protection, Westinghouse would have us hold that, since New York law provides that the income from all non-DISC subsidiaries is exempt from the State's franchise tax (Tax Law, § 208.9[a][1]), it is irrational to tax it on the deemed distribution income of its wholly-owned DISC subsidiary (Tax Law, § 208.8-A[b]). But, if the DISC had not elected to be treated as a domestic international sales corporation, the intercompany transactions in which it engaged would have compelled the Commission to require it and Westinghouse to file a combined report (see Tax Law, § 211 [4]). In the event, the allocated income of the DISC would be combined with the allocated income of Westinghouse (*see Matter of Wurlitzer Co. v. State Tax Commn.*, 35 N.Y.2d 100). As the Appellate Division correctly observed, "[t]here is nothing in the record to indicate that petitioner's tax liability resulting from a combined report . . . would be less than that which was in fact imposed" (82 A.D.2d 988, 989).

For all these reasons, the judgment of the Appellate Division should be modified by reinstating the determination of the State Tax Commission.

Chief Judge COOKE and Judges JASEN, GABRIELLI, JONES, WACHTLER and MEYER concur.

Judgment modified, with costs to the State Tax Commission, in accordance with the opinion herein and, as so modified, affirmed.

ORDER OF THE COURT OF APPEALS

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

No. 97

In the Matter of WESTINGHOUSE ELECTRIC CORPORATION,

Respondent-Appellant,

v.

JAMES H. TULLY, JR., & ors., as the Tax Commission of the State of New York,

Appellants-Respondents.

The appellant(s)-respondents in the above entitled appeal appeared by Robert Abrams, Attorney General;

The respondent(s)-appellant appeared by Cravath, Swaine & Moore.

The Court, after due deliberation, orders and adjudges that the judgment is modified, with costs to the State Tax Commission, in accordance with the opinion herein and, as so modified, affirmed. Opinion by Judge Fuchsberg. Chief Judge Cooke and Judges Jasen, Gabrielli, Jones, Wachtler and Meyer concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA

Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, April 1, 1982.